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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

TOM HALDE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of California denying writ of habeas corpus made and entered September 24, 1970.

OPINION BELOW.

The judgment of the California Supreme Court, one justice dissenting, was by unreported minute order included in the record filed herewith.

The opinion of the California Court of Appeal, Second Appellate District, in a prior, related proceeding (*In re Halde*, 2nd Crim. No. 18644) was similarly by unreported minute order. The original order of the respondent superior court adjudging petitioner guilty of contempt and imposing punishment was also unreported [Please see Petition, ¶ 5 and Ex. "A" thereto].

JURISDICTION.

The judgment of the California Supreme Court was entered on September 24, 1970. The petition for writ of habeas corpus before that court was a renewal of denial of habeas corpus by California's intermediate appellate court, which denial occurred August 20, 1970; the filing of such a new petition in the California Supreme Court, alleging denial of habeas corpus by the intermediate court, is the proper procedure for invoking review by the highest state court having jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED.

Does due process require that a charge of direct contempt by an attorney be determined by a judge other than the one affronted by or involved in the alleged contempt, at least where submitting the matter to a separate judge would not delay, impede or otherwise affect pending litigation?

STATUTE INVOLVED.

The California statute under which petitioner was apparently adjudged in contempt (although it is not specified in the record) was §1209 of the California Code of Civil Procedure (a typical codification of the direct contempt power). While that statute contains some 11 separate forms of proscribed conduct, some[1]

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[1]Such as rescuing person or property in the custody of an officer.

are palpably immaterial; the basic statute, with the subdivisions conceivably involved, is as follows:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

"1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

"2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

"3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

* * *

"5. Disobedience of any lawful judgment, order, or process of the court;

* * *

"8. Any other unlawful interference with the process or proceedings of a court;

* * *

"No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

STATEMENT OF THE CASE.

This is a proceeding to review an order of a California trial court adjudging an attorney guilty of direct contempt and sentencing him to jail and the payment of a fine. The facts are simple and uncontroverted.

Petitioner, a prominent insurance-defense trial lawyer (although representing an injured party at the time) was counsel for a minor plaintiff in a civil action for damages to the boy's eyesight which was brought and tried in the respondent court. The jury returned a verdict against petitioner's client. After the jury had rendered a verdict, had been polled and was discharged, but while the jury, the trial judge and all counsel were still in the courtroom, petitioner sought and was granted permission to address the jury [Petition, ¶¶ 1-4 and Ex. B].

He did so in terms which the trial judge deemed to be "quite sardonic" and "quite unprofessional on the part of [petitioner]", stated in a "sardonic and sarcastic tone and voice and manner, indicating clearly that the said Tom Haide, instead of really thanking the jury as he said he wished to do, used the occasion instead to deliberately castigate, embarrass and berate the jury for its verdict".[2] Certain of this occurred after the court stated "Just a moment" and "That will be sufficient" to petitioner [Petition, ¶ 5 and Exs. B-D thereto, Opposition, pp. 3-6].

Thereafter, and following the departure of the jury from the courtroom, the trial judge and petitioner engaged in a colloquy during which petitioner uttered certain remarks which the court deemed to be "made

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[2]These and other quotations are from the trial court's findings of fact.

in a loud, insulting and contemptuous tone of voice, accompanied by a contumacious facial expression" and on one occasion, the court believed that petitioner "purported to mimic the mannerism and tone and pace of the court's speech, in a sarcastic, contemptuous, and belittling manner". Also during that interchange, the court believed that petitioner interrupted the court "in a boisterous and tumultuous manner, and in loud voice, despite the court's efforts to stop him".

It is not disputed that those remarks (in general, although, of course, not in specific wording, tone or the like) were made in response to the court's invitation to petitioner to explain himself. Moreover, they were interspersed with adjudications of contempt; that is to say, the majority of petitioner's statements was made *after* he had been found in contempt for his comment to the jury, and in response to the court's statement that "I don't know what I should do about this . . . about the way you have taken on the jury and upbraided them for the verdict"

Finally (and after the third adjudication of contempt), petitioner started to make some reference to the trial judge's uncle, a retired superior court judge of the county involved, which the trial court deemed an improper effort to bring the judge's family into the case, despite the fact the judge holds his uncle in the highest regard. This produced the fourth contempt adjudication.

A week later, the respondent court, through the same judge involved in the foregoing, sentenced petitioner to imprisonment in the county jail for eight hours and the payment of a fine of $250.00, both to be executed forthwith. Execution of both portions of

the sentence, however, was stayed to allow review by the state courts and is now stayed by order of the respondent court pending the determination of this petition.

REASONS FOR GRANTING THE WRIT.

This petition presents the questions which this Court did not reach or consider in *Holt v. Virginia*, (1965) 381 U.S. 131, 135, footnote 2, 14 L.Ed.2d 290, 85 S.Ct. 1375:

> "We neither reach nor consider the questions whether the summary convictions of both [attorneys] were invalid because their alleged misconduct did not disturb the court's business or threaten demoralization of its authority [citation], . . . and whether [the judge] was so personally embroiled and interested in the controversy that he should not have decided the contempt issue."

There is presented here a situation in which an attorney's allegedly contemptuous acts occurred after the completion of a trial, after the jury was discharged, and at a time when there were no proceedings before the court to be impeded or embarrassed. Therefore, the "resistance to the authority of the judge and its exercise during the trial", which is the matrix of the necessary power of summary contempt punishment (*Ungar v. Sarafite*, (1964) 376 U.S. 575, 585, 11 L.Ed.2d 921, 84 S.Ct. 841; rehearing denied 377 U.S. 925), is absent from this case. Instead, this is the situation described by Chief Justice Taft as one "where conditions do not make it impracticable, or where the delay may not injure the public or private right" (*Cooke v. United States*, (1925) 267 U.S. 517, 539, 69 L.Ed. 767, 45 S.Ct. 390).

Similarly, there appears to be no independent ground of state law upon which the decision below could rest. While the statute would seem to bar a contempt adjudication which did not tend to interrupt the course of trial or other judicial proceeding, or any act when the court was not in session and which did not actually interfere with proceedings, the adjudication of petitioner's alleged contempt does not purport to find any of these matters present, so that the affirmance by the state supreme court cannot and does not rest on such circumstances (which are nonexistent factually, as well).

Therefore, the question is ripe for decision and squarely presented [Compare Opposition, pp. 10 *et seq.*].

I.

This Issue Represents the Intersection of the Rule in Tumey v. Ohio and the Evolution of Constitutional Doctrine Concerning Contempts.

For more than a generation, this Court has been solidly committed to implementing the fundamental, lodestone rule that "officers acting in a judicial . . . capacity are disqualified by their interest in the controversy to be decided" (*Tumey v. Ohio*, (1927) 273 U.S. 510, 522, 71 L.Ed. 759, 47 S.Ct. 437). While the Court there recognized the practical considerations may compel an evaluation of the degree or extent of interest, it went on to hold:

> "But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." (273 U.S. at 523.)

In determining whether that facet of due process thus described in *Tumey* prohibits the aggrieved judge from serving simultaneously as complaining witness, prosecutor and judge, there remain only a few questions:

(1) Is a lawyer against whom contempt punishment of this nature is imposed a "defendant in a criminal case" within *Tumey*;

(2) Is a "pecuniary interest" the only interest which will prohibit such inherent blurring of the function of prosecutor, judge and jury;[2] and

(3) Are there any practical limitations?

A. The Impact Which a Contempt Adjudication Has on a Lawyer Is Substantial.

A whole line of decisions makes it clear that contempts involving imprisonment and fines (and particularly those of attorneys, whose very livelihood may be at stake, no matter how trivial the punishment) are to be treated for due process purposes as criminal actions. (Please see, for example, *Holt v. Virginia, supra*, 381 U.S. 131; *Ungar v. Sarafite, supra*, 376 U.S. 575.)

It is significant that Ed Tumey was fined a mere $100 without any imprisonment, unless he failed to pay the fine (*Tumey v. Ohio, supra*, 373 U.S. at 515), whereas petitioner in the case at bench was fined two and one-half times that amount, and sentenced to spend a day in jail, to say nothing of the judicially noticeable side effects of such an action, particularly on an attorney practicing in a modest-sized community.

[2] See, *United States v. Barnett*, (1964) 376 U.S. 681, 726, 12 L.Ed.2d 23, 84 S.Ct. 984 (Mr. Justice Black, dissenting).

B. A Pecuniary Interest Is Not the Only Disqualifying Factor.

The somewhat more substantial question concerns whether an economic interest in the outcome is the only thing proscribed by this Court's declaration: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law" (*Tumey v. Ohio, supra*, 273 U.S. at 532).

It takes little more than common sense to determine that monetary considerations are not the only balance-disturbing aspects of the human condition. Indeed, it is a sly denigration of the role of the judge to state that he is distracted by bread alone, that a possible gain of $12.00 (the judge's stake in *Tumey*) is a danger to due process whereas an affront to ego, dignity or family pride is inescapable of distorting the impartiality of the judging process.

One of the Courts of Appeals has implicitly recognized this in condemning as "insensitive" an exercise of disciplinary authority where discipline is sought on the basis of an affront to the tribunal (*Burkett v. United States*, (Court of Claims, 1968) 402 F.2d 1002, 1007). Similarly, a state conviction has recently been reversed on the ground that the prosecuting attorney in a criminal proceeding also represented the defendant's wife in a divorce action, it being held (on the authority of *Tumey*) that although there was no evi-

dence of pecuniary effect nor of actual harm to the defendant, this distorted the prosecutor's ability to proceed fairly as a quasi judicial officer (*Ganger v. Peyton*, (C.A. 4th, 1967) 379 F.2d 709, 712-14).

If that is true of the public prosecutor, it is clearly true *a fortiori* of the judge.

The very fact that the judge in the case at bench particularly emphasized alleged mockery of his own mannerisms and purported reflection upon a relative, serves as an exemplar of the proposition. One need not resort to Polonius to infer that a judge may be more inflamed by attempted theft of his good name than of his purse.

C. There Should Be Exceptions to the Requirement of an Independent Judge, but They Should Be Limited to Cases of Clear Necessity.

In the specific context of contempt adjudications, petitioner is necessarily placing heavy and pervasive reliance upon the holding in *Offutt v. United States*, (1954) 348 U.S. 11, 14-16, 99 L.Ed. 11, 75 S.Ct. 11. In doing so, however, he recognizes and accepts the fact stated in an almost contemporary case that the right to be free from bias-inducing factors on the part of the trier is not absolute and "cannot be defined with precision [because] circumstances and relationships must be considered" (*In re Murchison*, (1955) 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623). Specifically, he recognizes the particular circumstances discussed in *Offutt* of a deliberate personal attack or in-

mundo against the judge, motivated to provoke him, disqualify him from the case or otherwise serve a forensic purpose (348 U.S. at 14).[4]

What petitioner does urge is the proposition which this Court and the lower courts have frequently stated, that while the rendition of justice and fairness to the litigants may require an exercise of summary contempt power under circumstances where referring the matter to another judge would frustrate the principal litigation, the need for an impartial arbiter must not be brushed aside under circumstances which involve no such impact on the principal litigation. (*Bloom v. Illinois*, (1968) 391 U.S. 194, 210, 20 L.Ed.2d 522, 88 S.Ct. 1477; *Harris v. United States*, (1965) 382 U.S. 162, 164, 15 L.Ed.2d 240, 86 S.Ct. 352; *Offutt v. United States*, *supra*, 348 U.S. at 17-18; *Cooke v. United States*, *supra*, 267 U.S. at 534; *Cf., United States v. Combs*, (C.A. 6th, 1968) 390 F.2d 426, 429-30.)

To put it very simply, the basic right to be judged by a disinterested person must predominate except in cases where its implementation would serve an ulterior purpose or would produce a miscarriage of justice for the litigants fundamentally involved. To put it in terms of the present case, there is no such need to override the fundamental interest to preserve the decorum of a trial which is already finished when the alleged contempt occurs.

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[4]Nor does this petition present a question of jury trial (*Cf.*, concurring opinion of Mr. Justice Black in *Offutt*, 348 U.S. at 18), not having been raised in the state courts. Suffice it to say that there is room for a distinction: a jury trial is not necessarily an indispensable ingredient of that fundamental machinery of civilized justice which constitutes due process; prohibiting anyone from being a judge in his own case *is* such a fundamental.

II.

There Is a Public Interest in the Resolution of the Question.

That the lines of authority discussed above come together has been foreshadowed by the Court's synthesizing them in a leading decision, citing both the *Tumey* and *Murchison-Offutt* rationales. (*Estes v. Texas*, (1965) 381 U.S. 532, 543, 14 L.Ed.2d 543, 85 S.Ct. 1628.) There is much to be said for a declaration as to whether this confluence of authority is merely apparent, or real. However, the problem involved here goes beyond the more "lawyerish" considerations which that suggests. It even transcends the going interest in the general subject of contempt adjudications which appears in scholarly writings.[5] Please see, for example:

"Summary Punishment For Contempt: A Suggestion That Due Process Requires Notice And Hearing Before An Independent Tribunal", 39 Southern California Law Review 463, *et seq.*;

"On Trial: Judge Julius Hoffman", 10 Santa Clara Lawyer 385, 391-2;

Davis, "The Contempt Power: The *Barnett* Dictum Has Matured in *Bloom;* But Is The Hybrid Viable?" 11 Arizona Law Review, 501, 527, *et seq.*;

Cf., Frankfurter and Landis, "Power of Congress Over Procedure In Criminal Contempts In Inferior Federal Courts—A Study In Separation of Powers", 37 Harvard Law Review 1010, 1056-7.

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[5]Particularly in the Western states, for no apparent reason.

There is an aspect of immediate, broad-ranged public concern in the resolution of this question.

It requires no citation of authority to assert the ugly fact that there are forces in our society which would impede (usually to the extent of destruction) the judicial process both as a means to accomplish their ends and for the impedance as an end in itself. Disruption, and far worse, as a weapon of advocacy is all too well and widely known; episodes in Chicago and San Rafael come readily to mind but regrettably are far from unique in nature, however monstrous in degree. But distortion of the judicial process does not come from one direction alone. As one commentator has observed: "[I]f a contempt to the law is an affront to the court, what about the demeanor of the judge as affected by his attitude toward the defendant?" (Davis, *op. cit., supra*, 11 Arizona Law Review at 527.)

The venerable teaching of so many of the cases cited here is that the important thing is not merely a search for the abstract ideal of justice, but also that "justice must satisfy the appearance of Justice" (*In re Murchison, supra*, 349 U.S. at 136; *Offutt v. United States, supra*, 348 U.S. at 14). Thus, it is as important, in nourishing acceptance of and regard for, the legal process, to make clear the fact that the judge is not a law unto himself as it is to make that point about other citizens. Law, after all, is the citizen's *quid pro quo* for surrendering the right to redress his own affronts and grievances by self-help. It is unseemly and inconsistent to say that the magistrates of that very law have the right to respond to *their* grievances and affronts in a way the law denies to every other party to the social compact.

These are not just abstract ideals in a time such as this. It is probable that *more*, not less, redress of courtroom contempts is in order. The antics which fill the press with copy and the public with disdain deserve firm response. In a very real sense, that response may be much more confidently made, once it is surrounded with the procedural safeguards which are bunched together under the phrase "due process". After all, the best of judges will function better and more firmly if their minds are freed from the self-doubt and self-suspicion engendered by filling several, inconsistent roles; and it is exactly the best of judges which is the ideal to be sought, while the ones who have no self-restraint are in the most need of external restraint.

One questions just how great a role the personalized involvement of the present system plays in arriving at the slap-on-the-wrist "punishments" which usually characterize actual contempts. What is needed is not more emotional, viscerally-motivated imposition of ineffectual sanctions, but rather more realistic and substantial penalties and deterrents delivered from the icy calm which is the law's ideal in every area other than the present. That qualification should be eliminated, and the law's response to contempt should be that of due process, just as it is in other things.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of California.

Respectfully submitted,

GIDEON KANNER,

Attorney for Petitioner.

Of Counsel:

EDWARD L. LASCHER,